SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

WILLIAM M. ANDREWS and BERTHA L. ANDREWS, Petitioners, vs. UNITED STATES OF AMERICA, Respondent.	}	No. [illegible] 32

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit

and

BRIEF BY THE PETITIONERS.

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To the United States Circuit Court of Appeals for the Eighth Circuit.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Come now William M. Andrews and Bertha L. Andrews and respectfully petition this Honorable Court to grant a writ of certiorari to review the opinion and judgment of the United States Circuit Court of Appeals for the Eighth Circuit, rendered on the 22nd day of December, 1943, in the case lately pending in said Court of Appeals, entitled United States of America, Appellant, versus William M. Andrews and Bertha L. Andrews, Appellees, bearing number 12,562, of causes on the docket of said Circuit Court of Appeals, reversing the judgment of the District Court of the United States in and for the Eastern Judicial District of Missouri in said cause in favor of these petitioners and against said respondent, which said judgment of the said

Court of Appeals became final on the 14th day of January, 1944, by the overruling by that Court of petitioners' petition for rehearing of said cause.

OPINION OF THE COURT BELOW.

The opinion of said Court of Appeals in the above-mentioned case which petitioners here seek to have reviewed has not yet been reported, but appears on pages 690 to 703 of the transcript of the printed record filed herewith.

SUMMARY STATEMENT.

This suit was a condemnation suit against these petitioners and their tract of land No. 19, alleged to contain 94.46 acres of land in St. Charles County, Missouri, for the acquiring of fee-simple title to said land by the United States for use by the War Department as a site for a TNT Manufacturing Plant (R. 478-485). A declaration of taking was filed and judgment entered thereon in favor of the United States on April 15, 1941 (R. 485-491).

These petitioners filed an answer to the condemnation petition on June 2, 1941 (R. 491-498), and an amended answer on February 27, 1942 (R. 498-505), in which they alleged that prior to the institution of the condemnation suit the United States Government had entered into a contract with these petitioners to purchase said land for a price of $12,000.00. A copy of said contract, marked "Exhibit A," and made a part thereof, was attached to said amended answer and may be seen as set forth in the original answer (R. 492-495).

The terms and provisions of the contract were set forth in said amended answer and the petitioners prayed the Court that commissioners be not appointed as prayed by plaintiff's petition, and that the condemnation award be fixed at the contract price and judgment entered thereon (R. 505).

An amended reply to the amended answer was filed on April 3, 1942 (R. 506), in which the Government alleged that the purchase contract was fraudulent because of certain alleged fraudulent representations, contrary to public policy and violative of a provision of the Act of July 2, 1940, 54 Stat. 712, 50 U. S. C. A., Appendix, Sec. 1171, known as Public Act No. 703.

On account of the large number of cases wherein the validity of the contracts was involved, and the importance of said cases, the three District Judges, sitting together in St. Louis, Missouri, in the Eastern Division of the Eastern Judicial District of Missouri, heard the evidence in the first case (the Callaway case), that case being one in the division presided over by Judge Collet, and he made the rulings on the evidence offered and later rendered a decision in that case (R. 42-336). (See U. S. v. 94.68 Acres of Land in St. Charles County, Mo., 45 Fed. Sup., p. 1016.) The other two Judges went to their respective court rooms after the trial of the first case and Judge Davis tried the Muschany case and Judge Moore tried the Andrews case.

After the submission of all three cases, and after consideration of them by the three Judges separately, Judge Collet held in the Callaway case that the contract was void because in violation of that provision of the statute of the United States known as the Act of July 2, 1940 (Public Act No. 703, 54 Stat. 712, 50 U. S. C. A., App. Sec. 1171), above cited, which act removes certain restrictions on the powers of the Secretary of War and gives certain additional powers to him and then prohibits him from using the cost-plus-a-percentage-of-the-cost system of contracting in contracts entered into by him under that act.

Judge Davis, in the Muschany case, decided that the said statute did not apply as the contract in question was not under the cost-plus-a-percentage-of-the-cost system of contracting and therefore did not violate that statute. He also found that the contract was valid and binding, and

that there was no evidence tending to show that it was procured by fraud. Judge Davis filed a written opinion, which is set forth in the record herein, pages 449-460 (for decree see R. 466-468). See U. S. v. Certain Lands in St. Charles County, Mo., 46 Fed. Supp. 920.

Judge Moore held the contract in the Andrews case valid, and adopted, as far as applicable, the opinion which had been rendered by Judge Davis in the Muschany case. Judge Moore's opinion is set forth in the record herein, pages 656-657 (for decree in that case see R. 663-665).

Inasmuch as Judge Collet found the contract in the case before him to be invalid, he ordered that the case should proceed as a case for condemnation of land, and that commissioners should be appointed to fix the value of the land in question in that case. There being no final judgment in that case, no appeal could be taken therein. No further action has been taken in that case to this date.

Judge Davis held in the Muschany case that the landowners therein were entitled to have judgment entered on the contract for the sum fixed therein, to wit, $4,500.00, together with interest on the sum of money representing the difference between the amount of estimated provisional just compensation deposited in the registry of the court and the contract price of $4,500.00, pursuant to the terms of the statute applicable in such cases (R. 468).

The judgment entered by Judge Moore in his division of the court in the Andrews case also fixed the compensation at the contract price of $12,000.00, together with interest on the amount of the excess of that price over the amount of the estimated provisional just compensation deposited in the registry of the court (R. 665).

Separate appeals were taken by the Government in both of said cases after proper proceedings in the District Court (R. 1-2).

It was stipulated at the trial of the Andrews case and also at the trial of the Muschany case that the evidence

offered in the trial of the Callaway case should be considered in evidence as far as applicable in the trial of said two last-mentioned cases, and, therefore, the parties entered into a stipulation (R. 3), which was filed in the Court of Appeals, agreeing that a joint transcript of the record might be prepared and filed and used in that court in the Andrews and Muschany cases, which was accordingly done by order of the Court of Appeals (R. 686). That record comprised 686 pages. Ten copies of it are filed herewith, it being deemed wholly unnecessary to burden the clerk's office with twenty copies, ten in this case and ten in the Andrews case, in that court.

After the taking of all proper proceedings, pursuant to the rules of the Court of Appeals, the Andrews case and the Muschany case were argued as one case on the 15th day of September, 1943, and submitted to the Court at that time (R. 689), and on the 22nd day of December, 1943, said Court handed down an opinion entitled in both of said cases, though a separate judgment of reversal was entered by that Court in each of said cases (R. 703-704).

We deem it appropriate to refer a little more in detail to the evidence offered in the District Court. That offered in chief by the Government showed clearly that all proper proceedings had been taken by the Government to authorize the District Attorney to institute and prosecute proceedings for the condemnation of said lands and it showed the institution of the suits (R. 42-44).

Evidence offered by petitioners showed that prior to the institution of the suits for condemnation, and at the direction of the Quartermaster General, Lieutenant-Colonel R. D. Valliant of the Quartermaster Corps, in charge of the real estate branch of that department (R. 50), undertook the work of negotiating for the purchase of lands in said area, and was properly designated to make contracts for such purchases, the War Department being authorized to acquire land for such purposes as that involved here, either

by purchase at such price as in the opinion of the Secretary of War was reasonable, or by condemnation (U. S. C. A., Tit. 50, Sec. 171).

The area involved was a very large one, embracing approximately 18,000 acres of land in St. Charles County, Missouri, something like thirty miles west of the City of St. Louis.

A man by the name of R. Newton McDowell came into the area in October or November, 1940, and began negotiating with landowners for option contracts on their respective lands in said area. Learning of the project, some landowners chose a committee to seek certain information. That committee telegraphed the Secretary of War at Washington, D. C., inquiring as to who was authorized to represent the Government in negotiating for the purchase of such lands, the landowners not being sure of the authority of McDowell. In reply to that telegram, the Secretary of War, on November 9, 1940, sent the following telegram to the chairman of said Committee:

"Nov 9 110P

E R Sutton Citizens Committee
"St. Charles Mo

Reurtel Oct Twenty Eight Weldon Spring Mo. Area Has Been Approved by War Dept for Munitions Plant Site Stop Property Will Be Purchased by Mister R. Newton McDowell and Agents Representing Office of the QM General Stop Mr. McDowells Organization Directly Represents the Government

Stimson, Secy of War,
Wash DC"

(R. 52-53.)

Being thus assured of McDowell's authority to represent the Government, these petitioners and many other landowners entered into negotiations with McDowell or his agents, and as the result of such negotiations the contract

here involved was furnished to the petitioners by McDowell, or his agents, already filled in and then signed by petitioners and turned over to McDowell for him to forward to the War Department. The price agreed upon as the purchase price in the contract was $12,000.00.

In securing the option contract in question in this case, as in all other cases, printed blanks which had been prepared by an attorney for the War Department and furnished to McDowell were used by him (R. 308). All of them were on printed forms precisely alike, merely leaving spaces for the date, the description of the land in question, the price agreed upon and the signatures of the owners. The Andrews contract is set forth in full on pages 492-495, inclusive, of the record.

The offer set out in the option contract, in a lump sum, the price to be paid by the Government, and provided that out of it the owner should pay McDowell 5 per cent and should pay all expenses of clearing the title (Rec. 493-494). It contained no provision whereby, after the Government accepted the offer, the amount to be paid by the Government or to be received by the owner or anyone else could be in any wise increased above the sum specified in the offer. When the Government accepted the offer the total cost was fully known and finally established.

The provision of the contract which gives rise to the question decided by the Court of Appeals was to the effect that 5 per cent of the purchase price fixed in said contract should be paid by the landowner to McDowell to cover his commission for services. No evidence in the record shows that the price of the Andrews land was agreed on, and that 5 per cent was added to make up the $12,000.00. On the contrary, the evidence shows that Andrews considered only replacement value (R. 549), and first signed an option on the basis of $150.00 per acre, and then, after negotiating with Williams, McDowell's agent, signed another option on the basis of $125.00 per acre, which was accepted (R. 550).

The contracts were designated as option contracts. McDowell had no authority to sign any option, nor did he do so. He forwarded them to the office of the Secretary of War with his recommendation. The Quartermaster General had in his department experts who passed upon the contracts with relation to the prices and other features and then passed the contracts on to Col. Valliant, who was a man of vast experience in such matters, having charge of 107 projects of similar character for the Government, totalin, about $50,000,000.00. If a contract looked all right to him he signed an acceptance of it (R. 278), and one copy was then retained by him and one copy came back to the landowner, who then made a deed to his property and turned it over to the title company for approval. Immediate possession of the lands was given by the owners upon learning of the acceptance of their contracts by the Government (R. 555).

A large number of such contracts had been signed, and many of the deeds had been passed, and some of them had actually been recorded in the office of the Recorder of Deeds for St. Charles County, Missouri, and in a great many instances the contract prices had been paid to the landowners before the Government decided to deny the validity of any of the contracts. But when the Government had reached the conclusion that it would contest the contracts on February 7, 1941, it stopped payment on all other contracts for which the consideration had not yet been paid, including the one involved in this case (R. 82).

After all proper steps were taken by the Government this case was taken to the Court of Appeals.

In that court the judgment of the District Court was reversed on the theory that the contract in each case was under and pursuant to the cost-plus-a-percentage-of-cost system of contracting, and therefore void under the federal statute above cited (see Opinion of Court of Appeals, R. 690 to 703), and the cause was remanded to the District

Court with directions to proceed with the case as a condemnation suit, appointing commissioners, etc.

The Court of Appeals expressly exonerated from any charge of default or bad faith the Quartermaster Department, to which the Secretary of War had delegated the performance of his duties in the purchase of the land.

Thereafter, on the 14th day of January, 1944, the petitioners' petition for a rehearing of said cause, which had been filed in due time pursuant to the rules of the Court of Appeals (R. 737), was overruled by said Court and its judgment thereby became final (R. 739).

An application to withhold the mandate of the Court for thirty days in order to permit these petitioners to apply to this Court for a writ of certiorari was sustained by the Court of Appeals by order entered on January 25, 1944 (R. 741).

A duly certified copy of the record, including all of the proceedings in said cause in the District Court of the United States and in said Court of Appeals, is filed herewith under separate cover, together with the requisite number of copies thereof.

JURISDICTION OF THIS COURT.

The jurisdiction of this Court is based upon the provisions of Section 240 of the Judicial Code, 36 Stat. 1157, as amended February 13, 1925, C. 229, Sec. 1, 43 Stat. 938, 50 U. S. C. A., Sec. 347, which provides, in effect, that in any case in a Circuit Court of Appeals it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, to require by certiorari that the cause be certified to the Supreme Court for determination by it with the same power and authority and with like effect as if the cause had been brought there by unrestricted writ of error or appeal.

The judgment of the United States Circuit Court of Appeals for the Eighth Circuit sought to be reviewed was

originally entered on December 22, 1943 (R. 704). A motion for a rehearing was duly filed by petitioners, who were appellees in said court on January 6, 1944, within the time provided by the rules of said court (R. 737), and said motion for a rehearing was denied by said Court of Appeals on January 14, 1944 (R. 739), which is the date on which the judgment of said Court of Appeals became final.

In said cause said petitioners specifically set up and claimed a right under the statutes of the United States, and particularly United States Code Annotated, Title 50, Sec. 171, Act July 2, 1917, C. 35, 40 Stat. 241, as amended April 11, 1918, C. 51, 40 Stat. 518 (R. 498), which right was denied by the decision and judgment of said Circuit Court of Appeals.

QUESTIONS PRESENTED.

The questions presented by petitioners' petition for a writ of certiorari are:

1. Whether the Secretary of War, in undertaking the acquisition of the Weldon Spring lands, including land of petitioners, by purchase, derived his authority from the Act of July 2, 1917 (40 Stat. 241, 50 U. S. C. A. 171), or from the provisions of Section 1 of the National Defense Act of July 2, 1940 (Public Act No. 703, 54 Stat. 712, 50 U. S. C. A. App., Sec. 1171), or from both of said acts.

2. Whether, if the Secretary of War derived his authority to acquire said lands, wholly or partly from Section 1 of the National Defense Act of July 2, 1940 (Public Act No. 703, 54 Stat. 712, 50 U. S. C. A. App., Sec. 1171), his determination through his duly constituted agent, Col. R. D. Valliant, of the Quartermaster Corps, after seeking and being given a legal opinion in the War Department to the effect that the cost-plus-a-percentage-of-the-cost prohibition of the said Public Act No. 703, applied to construction

contracts and not to contracts for the purchase of land (R. 287-288) to use the plan of acquisition used in contracting with these petitioners amounted to such an exercise of an administrative discretion vested in him by law as set forth in said Public Act No. 703, to determine whether or not the use of the contract contemplated under this plan of acquisition was a violation of the cost-plus-a-percentage-of-the-cost prohibition in said Act as is not subject to judicial review and is therefore conclusive.

3. Whether, if the determination mentioned in the last above question did not amount to such an exercise of administrative discretion as is not subject to judicial review, the Andrews land sale contract with the United States in the instant case is a contract entered into by the Secretary of War under the cost-plus-a-percentage-of-the-cost system of contracting and therefore in violation of the prohibition imposed upon him by Section 1 of the National Defense Act of July 2, 1940 (Public Act No. 703, 54 Stat. 712, 50 U. S. C. A. App., Sec. 1171), prohibiting him from entering into contracts under that system and therefore void.

4. Whether the Circuit Court of Appeals was precluded both by the finding of the District Court and by the uncontroverted evidence to the contrary in the record (R. 549-550) from finding that petitioners' option price included the amount that petitioners asked for the land plus McDowell's fee of 5 per cent of the sale price (R. 699-700).

5. Whether the Government is estopped to deny the validity of the contract.

6. Whether the Government ratified the contract.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. The Court of Appeals, by holding the contract to be invalid on the theory that it was prohibited by the cost-plus-a-percentage-of-the-cost prohibition of the Act of July 2, 1940, 54 Stat. 712, having so held notwithstanding the showing in the record that that question of law was considered and decided in the Department before entrance into the contract (R. 287-288), undertook to pass on such a discretionary act of an official of the War Department as is **not subject to judicial review**, and in doing so has **so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision** within the meaning of subdivision (b) of Section 5 of Rule 38 of this Court.

2. The decision of the Circuit Court of Appeals not only unduly broadens the scope of the prohibition in the Act of July 2, 1940 (Public Act No. 703, 54 Stat. 712, 50 U. S. C. A. App., Sec. 1171), prohibiting the Secretary of War from entering into contracts under the cost-plus-a-percentage-of-the-cost system of contracting, but limits the express authorization to the Secretary of War to enter into contracts following the cost-plus-a-fixed-fee form of contracting, by holding in substance that while the instant contract is a cost-plus-a-fixed-fee form of contract, specifically authorized by the statute in question, it is, nevertheless, to be considered a cost-plus-a-percentage-of-the-cost contract, because, according to the Court's finding, it would lead to the same evil which Congress sought to eliminate by the cost-plus-a-percentage-of-the-cost prohibition and that such intention of Congress cannot be allowed to be defeated by a mere decoration in form (R. 701). This doctrine of the Court of Appeals, if not repudiated by the Supreme Court, will seriously limit the War Department in its use of the cost-plus-a-fixed-fee form of contract and

is, therefore, a matter of tremendous public importance and it certainly presents one or both of two highly important questions of federal law, being:

(A) Whether the determination by the Secretary of War through his agent, Col. R. D. Valliant, after obtaining a legal opinion in the War Department, that the instant contract did not violate the cost-plus-a-percentage-of-the-cost prohibition of said act upon the theory that said prohibition applied only to construction contracts and not to real estate purchases (R. 287-288) is subject to judicial review, and

(B) Whether, if that determination is subject to judicial review, the contract here involved is under the cost-plus-a-percentage-of-the-cost system of contracting and in violation of said prohibition and therefore void. The Controller General of the United States in his opinion, dated December 28, 1943, designated as B-38-322, decided that a contract involved, which followed the form of a cost-plus-a-percentage-of-the-cost contract, but which fixed a ceiling price of $6,000.00, beyond which the Government could not be liable, which ceiling price this contracting officer considered reasonable, was by reason of said ceiling price not within the scope of the prohibition of the Act of July 2, 1940 (54 Stat. 712), because the evils sought to be avoided by Congress in enacting said prohibition were avoided by the fixing of said ceiling price. The price fixed in the instant option contract is, of course, a definite price fixed at the time of entering into the contract by the Government beyond which the Government could have no further liability. Further, the Judge Advocate General, by his opinion S P J G C 1943 9887, rendered on July 8, 1943, has held that the mere fact that a fixed fee in a cost-plus-a-fixed-fee contract is arrived at by computing a percentage of the estimated cost does not make the contract a cost-plus-a-percentage-of-the-cost contract, and in support of this

proposition he points out that all fixed fees in fixed fee contracts must be arrived at by computing a percentage of the estimated cost for the reason that executive order No. 9001 provides that no fixed fee in a fixed fee contract shall be for a sum in excess of 7 per cent of the estimated cost. The fixed fee of McDowell in the instant contract was arrived at by computing a percentage of a definite price which is even more certain than computing a percentage of an estimated cost, and therefore even less apt to be considered objectionable. It is evident that both the Controller General and the Judge Advocate General believe that the evil legislated against by Congress in its cost-plus-a-percentage-of-the-cost prohibition was the incentive created by a compensation based on a percentage of an **undetermined cost**, and that that evil is eliminated by the fixed fee system.

3. The decision of the Court of Appeals construing an act of Congress known as Public Act No. 703, enacted on July 2, 1940, places an erroneous construction upon said act and thereby deprives these petitioners of their rights under Section 171, U. S. C. A. 50, under which the Secretary of War had a right to use his discretion in accepting an option for lands at a price which he deemed to be reasonable, said right having been exercised by said Secretary of War through its proper agent, and thereby having given to these petitioners a substantial right under the laws of the United States which was denied to them by said decision of the Court of Appeals.

Public Act No. 703 has no application to the contract involved in the Andrews case, because said contract did not contain the elements necessary to bring it within the class of contract known as cost-plus-a-percentage-of-cost contracts, because:

(A) The inhibition in said Act of July 2, 1940, was not intended to apply to contracts for the purchase of real

estate. The War Department, through its legal advisor, held that said act did not apply to purchases of real estate. [See testimony of Col. Valliant (R. 287).]

(B) There was no element of uncertainty or contingency involved in the commission to be paid the Government's agent, McDowell. That was definitely fixed when the option contract was accepted by Col. Valliant. The purpose of the provision in the Act of July 2, 1940, was to prevent frauds upon the Government, such as had frequently been perpetrated when the amount of the cost of a building or project was **not known in advance** and the commission to be paid the contractor could not, therefore, be determined in advance, and thus opportunities for stuffing pay rolls and increasing the cost of materials were seized upon by unscrupulous contractors.

4. There is a direct conflict between the opinions of two Circuit Courts of Appeals on an important question of law. The Circuit Court of Appeals for the Eighth Circuit in the case at bar held that the land purchase contract here involved is invalid because in the opinion of the Court it is a contract under the cost-plus-a-percentage-of-the-cost system of contracting within the prohibition of Section 1 of the National Defense Act of July 2, 1940 (54 Stat. 712, 50 U. S. C. A. App., Sec. 1171) (R. 691-703), whereas the opinion of the United States Circuit Court of Appeals for the Seventh Circuit in U. S. v. Grace Evangelical Church, 132 Fed. (2d) 460, held that a contract identical with the one here involved except as to dates, names, description and price and accepted by Col. Valliant, as was the one here involved, to be valid, the said court having so held notwithstanding the fact that the question as to whether the contract there involved was a contract under the cost-plus-a-percentage-of-the-cost system of contracting within the meaning of said prohibition of said act and hence invalid, was before the Court as is shown

both by the opinion of Judge Evans in the Grace Church case and the Government's brief filed therein. That the system of contracting used in the Grace Church case was identical with that used in the instant case is shown both by the description thereof in the opinion of the Court in the Grace Church case and by the testimony of Mr. Robert H. Fabian, witness for the Government in this proceeding with reference to the commission of Mr. Raymond D. Herman (R. 312), the land agent mentioned in the opinions of the Court in the Grace Church case.

5. The questions here presented are of very great public importance—so great as to justify the settling of the same by this Court, for the following reasons, to wit:

(a) Col. Valliant's testimony (R. 278) shows that he had 107 projects of similar character in charge and that they were widely scattered. In many instances he had made purchases on precisely the same basis as that involved in this case, and the money had been paid to the landowners by the Government.

(b) In negotiating for lands for the project in St. Charles County, Missouri, on which a TNT plant was to be erected, approximately 270 contracts were made and it appeared from the evidence that purchases had been made on the basis of those contracts with approximately 129 landowners (R. 282), and paid for. Large sums of money were thus paid out by the Government.

(c) A large number of cases in which similar contracts were made are now pending in the District Court where the case in question was tried. A great amount of money is involved in these unsettled claims.

(d) The Government, if the decision in this case by the Court of Appeals is allowed to stand, may feel that it is its duty to institute suits to recover back large sums of money from many landowners with whom settlements

were made on the basis of such contracts. If the decision of the Court of Appeals is right, then the Government has unlawfully paid out enormous sums of money in many cases. If the decision is wrong, then it deprives these landowners of money to which they are justly entitled.

Contracts of a similar character having been made in various states, the question of the validity of such contracts is likely to come before various other courts of appeals for decision. Not only the district courts in other circuits, but other circuit courts of appeals as well will, if the decision in this case is allowed to stand, find themselves confronted with conflicting decisions from the Seventh and Eighth Circuit Courts of Appeals, and if this writ is not granted and the matter is not settled by this Court such a state of affairs will lead inevitably to much confusion on the part of the bench and the bar in the United States courts.

6. Under the evidence revealed by the record the Government is estopped to deny the validity of the contract.

7. The Government ratified the contract.

PRAYER.

Wherefore, petitioners pray that a writ of certiorari be issued by this Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, to the end that the said opinion and judgment of said Court of Appeals in the case of United States of America, Appellant, versus William M. Andrews and Bertha L. Andrews, Appellees, No. 12,562, in said court, be reviewed by this Court as provided by law, and that upon such review said judgment be reversed, and the petitioners have such other relief as to this Court may seem appropriate.

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BRIEF

In Support of Petition for Writ of Certiorari.

OPINION OF THE COURT BELOW.

The opinion of the said Court of Appeals in the above-mentioned case, which petitioners here seek to have reviewed, has not been reported, but appears on pages 690-703 of the transcript of the printed record filed herewith.

STATEMENT OF THE CASE.

The essential facts of the case are fully stated in petitioners' petition for writ of certiorari, and, in the interest of brevity, they are not repeated here. Reference will be made to such facts where necessary in the course of the argument which follows:

SPECIFICATIONS OF ERROR TO BE URGED.

I.

The Circuit Court of Appeals erred in undertaking to decide whether the contract of petitioners with the United States fell within the class of contracts prohibited by the cost-plus prohibition of the Act of July 2, 1940 (Public Act No. 703, 54 Stat. 712), that question having been decided by the Secretary of War through his duly constituted agent, Col. R. D. Valliant, after obtaining a legal opinion of the War Department on the subject (R. 288), and the decision of that question having been the exercise of an administrative discretion vested in him by law, which, since he acted in good faith, as found by the Court of Appeals (R. 693, footnote No. 5 of the opinion), is not subject to judicial review.

II.

The Circuit Court of Appeals erred in holding that the option contract of the petitioners with the Government was entered into by the Secretary of War in violation of the prohibition directed to the Secretary of War in the Act of July 2, 1940 (Public Act No. 703, 54 Stat. 712), because of the use of the cost-plus-a-percentage-of-the-cost system of contracting, and, therefore, invalid because said contract lacked the essentials of a contract under said system of contracting.

III.

The Court of Appeals erred in holding that the method of contracting used in the case at bar gives rise to the evils sought to be prevented by the cost-plus prohibition of the Act of July 2, 1940 (Public Act No. 703, 54 Stat. 712), and, therefore, falls within the scope of said prohibition while at the same time making a finding of fact that the Quartermaster General's agent, Col. Valliant, acted in good faith for the reason that, if he did act in good faith, he did not omit to do anything necessary to protect his principal, the United States of America, and his power to reject the option was adequate protection for the Government against the payment of inflated values, and, furthermore, being in good faith, his discretionary acts are to be presumed to be right and not subject to judicial review.

IV.

The Court of Appeals erred in finding that William M. Andrews and Bertha L. Andrews arrived at the gross sales price in their option contract by figuring the net wanted price and adding McDowell's 5 per cent commission thereto (R. 700) in the face of the uncontroverted evidence embodied in the testimony of William M. Andrews to the effect that they fixed their first figure of $150.00 per acre,

which was rejected, on the basis of replacement value (R. 549), and then, after further negotiation, came down to a lower figure (R. 550).

V.

The Court of Appeals erred in not holding that the Government is estopped to deny the validity of said contract.

VI.

The Court of Appeals erred in not holding that the Government ratified said contract and is bound thereby.

SUMMARY OF THE ARGUMENT.

I.

The act of the Secretary of War through his duly constituted agent, Col. R. D. Valliant, in entering into the instant contract after considering whether it violated the cost-plus-a-percentage-of-the-cost prohibition of the Act of July 2, 1940 (54 Stat. 712), and obtaining a legal opinion on that subject in the War Department to the effect that said prohibition applied to construction contracts and not to real estate purchases (R. 288) was a discretionary act of an administrative officer not subject to judicial review. The aforesaid act had vested a broad discretion in the Secretary of War and pertained to the business of the War Department alone and was therefore, in so far as it directed the actions of officials of the War Department, to be construed by the War Department alone unless the War Department acted in bad faith in construing it, in which event only the act becomes subject to construction by the Judicial Department of the Government. Both the District Court and the Circuit Court of Appeals have made a finding to the effect that there is no question as to the good faith of the Department involved here.

Perkins v. Lukens Steel Co., 310 U. S. 113;
United States v. Speed, 8 Wall. 77;
Comptroller General's Opinion, 20 Compt. Gen. 890;
U. S. ex rel. Dunlap v. Black, Commissioner of Pensions, 128 U. S. 40.

II.

The contract involved here is not a contract under the cost-plus-a-percentage-of-the-cost system of contracting prohibited by the Act of July 2, 1940 (54 Stat. 712), and is not a cost-plus contract of any kind for the following reasons:

(A) At the time of the entering into the contract by the Government the total price of the land was fixed and not undetermined, whereas in a cost-plus contract the cost is undetermined at the time of entrance into the contract.

(B) There was no provision in the contract whereby the land agent, McDowell, was to be reimbursed for his costs in negotiating, whereas a cost-plus contract provides that the contractor shall be reimbursed for his costs.

(C) The contract is a fixed-fee contract because it was known when the contractual obligation arose that McDowell's fee was $600.00, or 5 per cent of $12,000.00. It was, however, not a cost-plus contract, but if it should be held to be a cost-plus contract, it would then be a cost-plus-a-fixed-fee contract, specifically authorized by the statute.

Bank of The United States v. Dandridge, 12 Wharton U. S. 64;
Opinion of Judge Advocate General, SPJGC, 1943/9887;
Digest of Opinion of Judge Advocate General, 2 Bulletin JAGA 278, July, 1943;
Opinion of Judge Advocate General, SPJGC 2174, May 27, 1942;
Opinion of the Comptroller General, not yet reported, but designated B-38,322, dated December 8, 1943;
United States v. Grace Evangelical Church, 132 Fed. (2d) 460.

III.

If the Quartermaster General acted in good faith, as was found by both the District Court and the Circuit Court of Appeals (R. 693, Footnote 5 of the Court's opinion), the method of contracting used by him did not bring about the evils sought to be avoided by the cost-plus-a-percentage-of-the-cost prohibition of the Act of July 2, 1940, as held

by the Circuit Court of Appeals, for the reason that he reserved the right to reject any or all of the options submitted, thereby avoiding any liability of the Government, either to the landowners or McDowell, as to any option so rejected. This power to reject the options was adequate means in his hands for the protection of the Government, and if he acted in good faith, as found by the courts, he did not and would not fail to use it in any instance in which it should be used. The evils which Congress had in mind in the aforesaid prohibition, such as inflated costs, could not therefore be here present.

Bank of The United States v. Dandridge, 12 Wharton U. S. 64;
Opinion of Judge Advocate General, SPJGC, 1943/9887;
Digest of Opinion of Judge Advocate General, 2 Bulletin JAGA 278, July, 1943;
Opinion of Judge Advocate General, SPJGC 2174, May 27, 1942;
Opinion of the Comptroller General, not yet reported but designated B-38,322, Dated December 8, 1943;
United States v. Grace Evangelical Church, 132 Fed. (2d) 460.

IV.

The finding of the Circuit Court of Appeals that petitioners fixed their net wanted price and added McDowell's 5 per cent commission thereto and thus arrived at the gross sales price stated in the contract is contrary to the uncontroverted evidence.

V.

The principle of estoppel is applicable against the Government as to the contract of these petitioners, the Govern-

ment having entered into the contract in its proprietary capacity as distinguished from its sovereign capacity.

J. Cooke v. U. S., 91 U. S. 389;
U. S. v. Wright, 78 U. S. 648;
Dayton Airplane Co. v. U. S., 21 Fed. (2d) 673.

VI.

The United States, with full knowledge of all the facts pertaining to the entrance into the contract and full knowledge of the terms and provisions thereof, and after having entered into possession under and by virtue thereof, retained said possession for a period of time long before the declaration of taking was filed in this proceeding and thereby ratified the contract.

North American Transportation & Traction Co. v. United States, 253 U. S. 330;
Ford v. United States, 17 Court of Claims Report 60;
Moran Brothers v. United States, 39 Court of Claims Reports 486.

ARGUMENT.

I.

The Act of July 2, 1917, Title 50, Sec. 171, provided, in substance, that the Secretary of War might acquire lands needed for sites for plants for the manufacture of explosives either by condemnation or by purchase at a price fixed by the landowner reasonable in the opinion of the Secretary of War. This vested in the Secretary a discretion either to acquire such land by condemnation or by purchase. It further vested in him a discretion to determine whether or not a price in a landowner's offer is reasonable, and if reasonable to purchase same at that price.

While that act required that the Secretary purchase only at a price reasonable in his opinion, it placed no limitation whatever on the landowner in fixing his price. This left the landowner free to fix his price at any figure that he desired and the elements that he may consider in fixing his price are not material in such a transaction.

It is contended by the Government, however, and held by the Circuit Court of Appeals in this proceeding that the contract entered into is a type of contract forbidden by a provision of the Act of July 2, 1940, 54 Stat. 712, Title 50, App. Sec. 1171, and that the Secretary of War being prohibited from entering into the contract by that act, the contract is void.

The last-cited act is an act giving the Secretary of War many powers to do various things and removing certain statutory restrictions on his power. It also vests great discretion in the Secretary of War. It pertains solely to the War Department's business.

After these powers are given to the Secretary the following provision is made:

> "Provided further that the cost-plus-a-percentage-of-the-cost system of contracting shall not be used

under this section; but this proviso shall not be construed to prohibit the use of a cost-plus-a-fixed-fee form of contract when such use is deemed necessary by the Secretary of War."

The prohibition of the use of the cost-plus-a-percentage-of-the-cost system of contracting above quoted is the provision of said act which the Circuit Court of Appeals says is violated by the contract in question here. This contract was in the form of an option prepared by the War Department, whereby the landowner, for a consideration of $1.00, agrees that he will sell his land to the United States of America for a stated price, give immediate possession of the land to the Government upon acceptance of the option, and upon payment of the purchase price pay the Government's agent, McDowell, who solicited the option on behalf of the Government, a commission of 5 per cent of the gross sales price (R. 492-495). The option involved in the Andrews transaction was accepted by the contracting officer in the Quartermaster General's office on behalf of the Government (R. 495).

The Circuit Court of Appeals holds that this contract entered into by the War Department was in violation of the above-quoted provision of 54 Stat. 712, prohibiting the War Department from entering into contracts under the cost-plus-a-percentage-of-the-cost system of contracting, and is therefore invalid.

We submit, however, that 54 Stat. 712 vested in the Secretary of War the discretion to determine whether or not any contract which he contemplated entering into violated the foregoing prohibition, for if he did not have that discretion he could not contract at all, for the question as to whether any given contract which he contemplated entering into violated said prohibition would remain undetermined unless he could determine it. Such a condition would be contrary to the general tenor of the act, the general

purpose of which was to enlarge his power and discretion in view of the emergency.

We further submit that the testimony by Col. Valliant, the contracting officer (R. 288), to the effect that the question had come to their attention, and that an opinion was given him that said prohibition applied to construction contracts and not to land purchases, together with the fact that he subsequently accepted the option of these petitioners and many others, together with the telegram of Secretary of War himself to the landowners committee (R. 52-53), conclusively shows that that discretion was exercised. And we further submit that in view of the fact that the contracting officer acted in good faith as held by both the District Court and the Circuit Court of Appeals (R. 693, footnote 5, of Court's opinion), his exercise of that discretion was the exercise of such an administrative discretion as is not subject to judicial review, and that the Court of Appeals was precluded from holding that the contract so entered into violated the aforesaid prohibition of said act.

In support of our proposition that the foregoing was such an exercise of administrative discretion, we direct the attention of the Court to an opinion of the Comptroller General, reported in 20 Comp. Gen. 890, which, while it involves the construction of a different statute, substantiates the principle above set forth. A quotation from the Comptroller General's said opinion follows:

> "It is to be observed, too, that Section 2 of said Act excepts several classes of contracts from the provisions of the Act and **necessarily, in awarding contracts, a certain amount of discretion must be exercised in the way of determining whether a particular contract falls within the exceptions. It has been held that where a discretion of this kind has been conferred upon an officer and a contract is made in which that discretion has been exercised that the validity of the contract cannot be made to depend** on the degree of

wisdom or skill which may have accompanied its exercise. U. S. v. Speed, 8 Wall. 77. The record contains nothing to indicate that the omission of the requirements of the eight-hour law from the subject contract was merely an oversight or was for the purpose of contravening the law; and in the absence of such a showing it is to be presumed that the contracting officer was acting in accordance with law and considered, in the necessary exercise of his discretion, that the contract fell within one of the classes of exceptions and was not subject to the provisions of the law."

The highest authority on the question, however, is a decision of this Court, decided on April 29, 1940, the opinion having been written by Mr. Justice Black and the case being Perkins v. Lukens Steel Company, 310 U. S. 113. In this case the construction of an Act of Congress by the Secretary of Labor was in issue. It was claimed that the Secretary erroneously construed the term "locality." The following is an excerpt from the opinion of the Court written by Mr. Justice Black:

"Courts have never **reviewed** or **supervised the administration** of such an executive responsibility, **even where executive duties require the interpretation of the law. Judicial restraint of those who administer the government's purchasing** would constitute a break with settled judicial practice, and a departure into fields hitherto wisely and happily apportioned by the genius of our polity to the **administration of another branch of the Government.** * * * We find nothing in the Act indicating any intention to abandon a principle acted upon since the nation's founding under which the **legislative and executive departments have exercised complete and final authority to enter into contracts for Government purchases.** The committee hearings and reports and the construction of the measure by its sponsors disclose no purpose to **invoke judicial supremacy over agents chosen by Congress to perform these duties.**"

We submit that it was the duty of the Secretary to acquire real estate in a time of great national emergency for a site for a munitions plant. Vast discretion had been conferred upon him by laws of Congress. He had the discretion to acquire by purchase. While he was subject to the directions and restrictions imposed upon him by Congress, we submit that under the doctrine of the above-cited cases it was his function and not the function of the judiciary to construe those directions and restrictions. In this connection we also cite U. S. ex rel. Dunlap v. Black, Commissioner of Pensions, 128 U. S. 40.

We further submit that the act of the Circuit Court of Appeals in reviewing said discretionary act of the Secretary of War and in determining that the Secretary of War violated the law as set forth in the aforesaid Act of Congress "so far departed from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this Court's power of supervision" within the meaning of subdivision (b) of Section 5 of Rule 38 of this Court.

II and III.

We submit that the contract between petitioners and the Government was not under the cost-plus-a-percentage-of-the-cost system of contracting. At the time of the passage of the Act of July 2, 1940, 54 Stat. 712, the terms "cost-plus-a-percentage-of-the-cost" and "cost-plus-a-fixed-fee" both had a definitely established meaning known to Congress and known to the War Department and public contractors generally largely as a result of the first World War.

The essence of the cost-plus-a-percentage-of-the-cost system was that the Government commits itself in advance by binding obligation to pay **an amount not specified in the contract** which amount is to be ascertained **in the future** by **computation of the total cost**, and at the time

of entrance into such a contract the Government also commits itself to pay in addition thereto a percentage of said **then unknown amount** as compensation to the contractor.

In the contract between the Government and these petitioners the Government did not bind itself to pay an unknown cost, but bound itself to pay $12,000.00 for the Andrews' land. There was no provision in the contract whereby the price could exceed that amount. There was no plus item payable to these petitioners; on the contrary, there were some minus items for them to consider. Petitioners had agreed in the contract to pay the Government's agent McDowell out of this $12,000.00 a commission of 5 per cent thereof, or $600.00, and to pay the other expenses of the sale, and this amounted to an agreement to pay the Government's obligation to McDowell under its contract with him which provided that the 5 per cent commission payable to McDowell by the vendor on the gross sale price was to be the **sole** compensation for the **services rendered thereunder.** (232 Govt. Exhibit M-5.)

We submit that this was not a cost-plus contract at all, but that it was a fixed-fee contract because the compensation to McDowell was fixed at 5 per cent of the gross sales price, which amounted to $600.00, said sum to be paid out of that gross sales price and not to be an additional $600.00 over and above the gross sales price. The contracting officer knew at the time that he bound the Government, that McDowell's commission was $600.00, and that it could not exceed that amount. Furthermore, since it was a fixed fee contract we submit that even if it should be construed to be a cost-plus contract, which construction we contend would be erroneous, it would then fall into the category of a cost-plus-a-fixed-fee form of contract specifically authorized by the Act of Congress, which act says,

> "but this proviso shall not be construed to prohibit the use of a cost-plus-a-fixed-fee form of contract

> when such use is deemed necessary by the Secretary of War,"

and would therefore be legal and valid because specifically authorized by the act.

In this connection we think it pertinent to refer to an opinion rendered by the Judge Advocate General on July 8, 1943, SPJGC 1943/9887, to the effect that the mere fact that the fee in a cost-plus-a-fixed-fee contract is determined by a stipulated percentage of the estimated cost which may later prove to be greater or less than the actual cost of the work is not objectionable and does not render the contract in violation of the cost-plus-a-percentage-of-the-cost prohibition. The opinion further comments that as a matter of fact the percentage method is the only method that can be used in fixing such a fee because of the following quoted provision in Executive Order No. 9001:

> "In the absence of such limitation, the fixed fee to be paid the contractor as a result of any cost-plus-a-fixed-fee contract entered into under the authority of this order shall not exceed seven per centum of the estimated cost of the contract."

It is obvious that in order to determine whether the seven per cent limitation of the fixed fee, demanded by the executive order, is being complied with, the contracting officer would have to use a percentage method of fixing the fee in any cost-plus-a-fixed-fee contract.

The above cited opinion of the Judge Advocate General is digested in the Bulletin of The Judge Advocate General of The Army, July, 1943. This Bulletin is compiled by the Judge Advocate General as a Government Bulletin and, according to a letter of Gen. G. C. Marshall, Chief of Staff, appearing as a preface, is published for the information and guidance of all concerned.

A quotation from said digest of said opinion in said Bulletin, appearing on page 278 thereof, is as follows:

> "A contract under which the fee is determined by a stipulated percentage of the estimated costs is a cost-plus-a-fixed-fee contract; this does not violate the prohibition against the cost-plus-a-percentage system of contracting because such fee is fixed **in advance of performance** and is **not subject to subsequent modification.**"

The fee of McDowell provided for in the contract of petitioners with the Government was fixed at the time of entrance into the contract by the Government and was not subject to subsequent modification.

Furthermore, in another opinion of the Judge Advocate General (SPJGC 2174, May 27, 1942), the cost-plus-a-percentage-of-the-cost system of contracting is defined. The following is a quotation from the opinion:

> "In general it may be stated that the designation **cost-plus-a-percentage-of-the-cost system** of contracting is intended to refer to that method of contracting whereby the compensation of the contractor is determined by a percentage of the costs of labor and material and the direct incidental expenses of the project; **which costs and expenses are paid by the Government.** Under such plan the compensation of the contractor is **greater proportionately as the cost of the project increases.** The system has been condemned because of the incentive to the contractor to **increase the cost to the Government.**"

It is obvious, of course, that the contract of these petitioners with the Government being to sell the land at a fixed price left no room for such incentive as is referred to in the last quoted opinion.

The Comptroller General, in an opinion rendered December 8, 1943, being B.38322, held a contract which actually

followed the cost-plus-a-percentage-of-the-cost form of contract up to a fixed ceiling price to be a cost-plus-a-fixed-fee form of contract and therefore valid because the ceiling price fixed by the contracting officer amounted to a fixing of the fee and held that in view of the contracting officer's discretionary decision that the $6,000.00 ceiling price was reasonable, no evil could result from the contract.

There has been a contention by the Government, which contention seems to have influenced the Court of Appeals, to the effect that the plan of acquisition used in bringing about the contract of petitioners with the Government had present in it an incentive to McDowell, the land optioner, to promote high prices in order that his 5 per cent commission would be greater and that that assumed proposition in some way or other renders the contract of petitioners a contract under the cost-plus-a-percentage-of-the-cost system of contracting.

This theory, however, overlooks some important factors. It overlooks the fact that the contract between McDowell and the Government (Govt. Exhibit M-5, R. 231-233) provided that his sole compensation was to be a 5 per cent commission payable by the vendor while at the same time reserving the right to the Government to reject any or all options submitted. Under such a state of facts, if the contracting officer should have exercised his right to reject the options, McDowell's compensation would have been nothing. That being true, McDowell had an incentive to procure the options at such a figure as it was reasonable to believe would be approved. This is exactly what happened in the transaction involving these petitioners. They at first submitted an option in favor of the United States to McDowell's man Williams on the basis of $150.00 per acre, but McDowell sent Williams back to them and Williams procured the option here involved at the lower price of $12,000.00.

Furthermore, regardless of McDowell's incentive, whether

it was to lift the prices up or keep them down, he was a mere negotiator, and when the contract actually came into being by the acceptance of the option by the contracting officer, the incentive of McDowell could no longer operate as is not the case under the cost-plus-a-percentage-of-the-cost system, and the contracting officer immediately before the contract came into being had ample power to prevent any evil consequence to the Government from any incentive that might have actuated McDowell while the option was in the process of negotiation by simply rejecting the option. As Mr. Justice Murphy has aptly said in United States v. Bethlehem Shipbuilding Co., 315 U. S. 289, "the United States is armed with both an actual and potential arsenal of powers adequate to protect it in dealing with private persons," and we submit that it surrendered none of these powers in this transaction. The contracting officer not only had the power to protect the Government, but did so. He exercised his discretion and determined the price to be reasonable. Both the District Court and the Circuit Court of Appeals have found that there is no question as to his good faith, and if he acted in good faith the presumption of law is that he did everything that it was his duty to do. In Bank of The United States v. Dandridge, 12 Wharton U. S. 64, the opinion of the Court contained the following statement:

> "The presumption is that no official person, acting under oath of office, will do aught which is against his official duty to do or will omit to do aught which his official duty requires should be done."

We suggest that if the Government had contracted with McDowell to buy the land himself and had at the same time agreed to buy it from him at the price which he paid for it plus 5 per cent, that would have been a cost-plus contract; but such was not the arrangement. McDowell had no power to buy the land but was a mere negotiator and

the Government had specifically reserved the right to reject the negotiated options, in which event McDowell was to get no compensation. If, on the contrary, the option was accepted, McDowell would receive only a fixed percentage of the fixed price and he was not to be reimbursed for his expense in negotiating same.

We submit that it is highly significant that a contract containing provisions identical with the provisions of the contract under consideration in this case was held valid by the Court of Appeals of the Seventh Circuit in United States v. Grace Evangelical Church, 132 Fed. (2nd) 460. That the question as to whether the contract involved in that case was in violation of the aforesaid prohibition against the cost-plus-a-percentage-of-the-cost system of contracting was before the Court is shown by the dissenting opinion, although the majority of the Court apparently did not consider the point of sufficient merit to call for discussion in the opinion.

We submit further that the existence of the aforesaid decision of the Court of Appeals of the Seventh Circuit and the decision of the Circuit Court of Appeals of the Eighth Circuit in the case at bar creates a condition "where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter" within the meaning of Subdivision (b) of Section 5 of Rule 38 of this Court.

IV

These petitioners did not arrive at their price of $12,000.00 by fixing their net wanted price and then adding McDowell's 5 per cent commission thereto as found by the Circuit Court of Appeals (R. 699-700) and contrary to the finding of the Court that there is no evidence in the record that they did not (R. 699), there is uncontroverted evidence that they did not do so, being the testimony of William M. Andrews to the effect that they considered

only replacement value in fixing the price named in the first option signed by them on the basis of $150.00 per acre, and that after negotiation they came down to the $12,000.00 price fixed in their accepted option, being on the basis of approximately $125.00 per acre (R. 549-550).

V.

The Government is estopped from denying the validity of the contracts by reason of the fact that in contracting with the petitioners herein it was acting in its proprietary capacity as distinguished from its sovereign capacity, and that when it acts in said proprietary capacity it is subject to the general rules of estoppel applicable to private persons and by reason of the further fact that long after it had obtained possession of the land under the contracts and after it had failed to do its part in the completion of the transaction, and for a long period before it had filed this proceeding, it retained the fruits of the contract, to wit, possession of the land.

VI.

In view of the fact that the Government went into possession of the land under the contract in December, 1940, and remained in possession until June 2, 1941, the date of the filing of the declaration of taking, it ratified the contract, and if the contract was, as a matter of fact, invalid, it would be validated by the aforesaid ratification.

Respectfully submitted,

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